CASE NOS. 89-1391, 89-1392

In The United States Supreme Court

October Term, 1990

DR. IRVING RUST, et al.,

Petitioner,

v.

DR. LOUIS SULLIVAN,

Respondent.

and

THE STATE OF NEW YORK, et al.,

Petitioner,

v.

DR. LOUIS SULLIVAN,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL OF OHIO,

ON BEHALF OF HIMSELF AND THE ATTORNEYS GENERAL OF THE STATES OF **ALASKA, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, MINNESOTA, NEBRASKA, NEW JERSEY, OREGON, TEXAS, VERMONT AND VIRGINIA,** AND THE CORPORATE COUNSEL FOR **THE DISTRICT OF COLUMBIA, AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

Petitioners the State of New York and Dr. Irving Rust, *et al.*, have presented four questions each for review. The amici curiae herein wish to address the following:

1. Do new regulations promulgated by HHS under Title X of the Public Health Service Act which prohibit abortion counselling, referral and advocacy in programs funded under the Act and require physical separation of Title X funded facilities and facilities engaging in abortion-related services, violate the woman's and the health professional's First Amendment rights?

2. Does the regulations' prohibition of abortion counselling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully infomed decision on whether or not to continue her pregnancy?

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BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

STATEMENT OF THE CASE

Amici rely on the statement of the case set forth in the Petitioner's brief.

INTEREST OF AMICI CURIAE

This brief is filed by Anthony J. Celebrezze, Jr., Attorney General of Ohio, joined by the states of Alaska, California, Connecticut, Delaware, Maine, Minnesota, Nebraska, New Jersey, Oregon, Texas, Vermont and Virginia, and the corporate Counsel for the District of Columbia.[1] Amici either

[1] Most state agencies that receive and disburse Title X funds are members of the National Family Planning and Reproductive Health Association (NFPRHA) and are plaintiffs-appellees in *Massachusetts v. Secretary of Health and Human Services,* 899 F.2d 53 (8th Cir. 1990). This Court denied a motion to consolidate the Massachusetts case with the instant case. *See Sullivan v. Massachusetts,* Case No. 89-1929, 1990 U.S. Lexis 3528. The attorney general of Massachusetts is filing an amicus brief and supports this amicus brief.

participate directly as Title X grantees, or have public or private Title X grantees within their borders, through which health care services are provided to hundreds of thousands of citizens.[2] Amici now join together to urge this Court to reverse the judgment below.

The amended regulations to the Public Health Service Act, Title X, if permitted to go into effect, will force the amici to choose between accepting federal Title X funds under an objectionable program, and forfeiting receipt of Title X funding altogether. The former option will result in the invasion of the physician-patient relationship and the first amendment rights of both patients and health care providers; the transmittal of incomplete, misleading, and in some cases, medically dangerous information to pregnant women; and the ultimate frustration of the right to make an informed, independent decision whether to terminate a pregnancy. The latter option will reduce the monies available to fund family planning services. Either option will seriously undermine effective family planning and related health care services for low income women.

Agencies which both receive and disburse Title X funds have a unique interest in the amended regulations. Most of the amici provide matching funds from their own revenues to support Title X projects. The regulations, as amended, would expand the definition of "Title X Project" to require that non-federal funds also be used to provide women with misleading and possibly medically dangerous information which will undermine their right of choice. The amendments will impede the capacity of the amici to allocate state or local funds to provide balanced post-conception counselling and referral services even outside the ambit of the federal Title X program.

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[2] All of the amici states have local Title X grantees within their borders. State agencies in the amici states of Ohio, California, Nebraska, Oregon, Texas and The District of Columbia participate directly in the Title X program.

SUMMARY OF ARGUMENT

Amici support and join in the arguments presented by Petitioners and the American Public Health Association, et al. This brief, however, will focus on issues of particular concern to Ohio and the other amici.

The regulations at issue will result in provision of slanted and misleading information to women and will undermine, rather than promote, each woman's right to make an informed reproductive health decision. The regulations require a Title X physician to violate sound medical practice and professional ethics; unless the patient's life is in immediate danger, the amended regulations forbid a Title X physician from discussing the abortion option with a woman even when the abortion may be advisable to protect her health. Consequently, the health of many patients will be jeopardized. Many Title X providers are likely to refuse further participation in the program should the regulations go into effect. The low income women served by the program will have no alternative sources of care. Inevitably, fewer women will receive any family planning services. Consequently, unintended pregnancies will increase, and government costs for medical treatment, social services, and subsistence payments will soar.

The amended regulations cannot be upheld under the government's discretion not to fund certain programs, because the amendments curtail pure speech, and do so in a content-discriminatory manner. The regulations require the dissemination of information about childbearing but censor speech about abortion. The rigid exchange mandated between patient and health care professional bears the imprimatur of a government program, upon which the patient relies for full information about her choices. In fact, the option to terminate her pregnancy has not been disclosed. By intentionally misleading the patient regarding her choices, the regulations impose an impermissible obstacle to a woman's liberty and privacy rights to make an informed reproductive health decision.

In addition, the regulations impose an unconstitutional condition upon the receipt of a government benefit. Title X provides both grants to Title X clinics, and subsidies for medical, counselling and referral services to Title X patients. As a condition to receiving these benefits, both the patient and health care professional must relinquish their first amendment rights to exchange information about the termination of pregnancy. The first amendment prohibits the federal government from imposing this gag on pure speech.

Finally, the regulations extend far beyond a mere restriction on the use of federal funds. They redefine the scope of the Title X project in such a way that matching funds provided by amici would be swept within the new rules. The amendments do not promote the public welfare, the conditions for state participation are vague, the regulations contravene the purpose of Title X funding, and the rules would require state funds be used to defeat the constitutional rights of Title X patients. These conditions on the expenditure of state monies exceed constitutional limits on the spending power of Congress.

ARGUMENT

I. THE TITLE X AMENDED REGULATIONS WILL PROVIDE INCOMPLETE AND MISLEADING INFORMATION TO WOMEN MAKING REPRODUCTIVE HEALTH DECISIONS AND WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO LOW INCOME WOMEN.

Title X of the Public Health Service Act authorizes grants to for-profit and non-profit organizations "to assist in the establishment and operation of voluntary family planning projects," primarily for low income families. 42 U.S.C.A. Sections 300, et seq. (West 1982). Direct or indirect Title X grantees include state, county, and municipal health departments, family planning clinics, hospitals and community health organizations. Nationwide, there are about 2,500 different agencies operating some 5,100 clinics; eighty

percent of these receive Title X funding. Clinics operated by public health departments serve about forty percent of family planning patients. Forrest, *Delivery of Family Planning Services in the United States,* 20 Fam. Plan. Persp. 88, 92 (1988) [hereinafter *Delivery of Services*].

In 1987, federal and state governments spent a total of 386 million dollars for family planning services. Title X grants accounted for thirty-four percent of this total. Other federal funding sources included Medicaid reimbursement, Social Services block grants, and Maternal and Child Health block grants. State governments provided thirteen percent of the total public funding for family planning services. Gold and Guardado, *Public Funding of Family Planning, Sterilization and Abortion Services, 1987,* 20 Fam. Plan. Persp. 228 (1988). States which receive Title X funds are required to provide a minimum of ten percent in matching funds. 42 U.S.C.A. Section 300a-4 (West 1982).

A sampling of eight amici states shows over 1.1 million women received family planning services through Title X regulated programs in these states alone.[3] *See* Appendices A-H. Public funding from combined sources in these eight states amounted to over 117 million dollars, twenty-eight percent of which was from federal Title X grants. *Id.* The eight states provided twenty percent of family planning services support for a total contribution of more than 24 million dollars. *Id.*

Nationwide, subsidized clinics serve nearly five million women per year. Ninety percent of these women receive pregnancy prevention services. Nine percent of all visits (thirteen percent of all initial visits, and twenty percent of all visits by teenagers) involve a pregnancy test. Only about four percent of all patients are pregnant when they come

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[3] California, Maine, Massachusetts, Ohio, Vermont and Virginia provided statistics showing the total women served in 1989 and funds allotted for 1990. See Appendices A-C, E, and G-H. Nebraska and Texas provided statistics showing the total women served and funds allotted for calendar year 1989. See Appendices D and F.

to the clinic. Rosoff, *Taking Family Planning Out of Title X: The Impact of the Proposed New Regulations*, 19 Fam. Plan. Persp. 222, 223 (1987) [hereinafter *New Regulations*].

The Title X clientele is composed of those women in greatest need of objective information about their health and pregnancy options, and those least able to obtain that information independent of public assistance. Eighty-three percent of clinic patients have incomes below 150 percent of the poverty line. Thirteen percent receive welfare. Thirty-two percent are under 20 years of age, and 14 percent are under 18 years of age. *Delivery of Services* at 92. A teenager is in particular need of "mature advice and emotional support" in making the "grave decision" whether to carry a child to term. *Hodgson v. Minnesota,* 58 U.S.L.W. 4957, 4974 (June 25, 1990) (Kennedy, J. Concurring and Dissenting). *See also, Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52, 91 (1976) (Stewart, J., Concurring).

A. THE AMENDED REGULATIONS WILL SUPPRESS THE FLOW OF COMPLETE MEDICAL INFORMATION NECESSARY FOR INFORMED CHOICE.

Despite Congress' numerous refusals to amend Title X to bar use of federal funds to inform women of the availability of abortion, the United States Department of Health and Human Services (hereinafter HHS) elected to accomplish the same result in 1987 by administratively "reinterpreting" the Act. *See* McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics,* 77 Calif. L. Rev. 1181, 1183 (1989). In so doing, HHS rejected its own longstanding position that the Act required "non-directive" counselling of pregnant patients regarding both abortion and its alternatives. *State of New York v. Sullivan,* 889 F.2d 401, 405 (2d Cir. 1989).

The HHS regulations now declare the Title X family planning function must terminate with pregnancy and forbid the clinic to provide counselling or referrals for an abortion. 42 C.F.R. Sections 59.2 and 59.8(a)(1) (1988). However, the

clinic is affirmatively required to refer the pregnant patient "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child," except when an emergency abortion is required to protect the life of the mother. 42 C.F.R. Section 59.8(a)(2) (1988). Any referral list given to the patient must exclude "health care providers whose principal business is the provision of abortions," but may not exclude, for any reason, any agency which does not provide abortions. 42 C.F.R. Section 59.8(a)(3) and (b)(4) (1988). Under the amended regulations a physician would be precluded from raising the issue of abortion or responding to questions raised by a patient, even if childbearing would threaten the health of the mother, or pose a non-emergency threat to the life of the mother. 42 C.F.R. Section 59.8(b) (1988).

In case there is any doubt about the meaning or intent of the regulations, it is resolved by the examples contained therein. If a patient asks her physician whether an abortion is medically advisable, or even simply requests a referral for an abortion, the response, scripted by the amended regulations, must be, "The project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion . . . [T]he project can help [you] to obtain pre-natal care . . ." 42 C.F.R. Section 59.8(b)(5) (1988). The woman must then be given a list of all providers of pre-natal care from which any providers whose principal business is abortion have been excised.[4] The list may neither include an abortion clinic, nor exclude a provider of pre-natal services. 42 C.F.R. Sections 59.8(b)(3) and (b)(4) (1988). A woman requesting abortion referral services may not even be given the Yellow Pages to locate and call an abortion provider herself, since the telephone book constitutes a "list" which may contain "forbidden" providers. 53 Fed. Reg. 2922, 2942 (1988).

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[4] This requirement censors referrals to most possible abortion sources for low income women. Eighty-three percent of all induced abortions are performed at specialized abortion clinics. In 1983, only three percent of family practitioners and forty-two percent of gynecologists would provide an abortion. *Delivery of Services* at 90.

In the decision below, the concurring judge found these regulations "jeopardize[ ] the ability of Title X physicians to safeguard the health of those seeking their expert advice." *State of New York v. Sullivan,* 889 F.2d at 415 (Cardamone, J., concurring). The ban on providing even a telephone book to a needy client was deemed "a small and petty contrivance, inconsistent with our nation's high principles." *Id.* The HHS regulations not only frustrate a woman's individual choice, but also affect the entire health care system for low income women.

B. THE AMENDED REGULATIONS WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO THOSE IN MOST DESPERATE NEED.

The reach of the amended regulations extends far beyond the mere expenditure of federal dollars. "Title X Programs" and "Title X Projects" as redefined include not only direct federal subsidies, but any other funds, public or private, used in the Title X project. 42 C.F.R. Section 59.2 (1988). If a state contributes to the Title X project, or if the clinic uses its own private funds to support Title X activities, the use of these alternative funds is likewise held hostage to the Title X requirements, and is gagged as well.

If subjected to the new regulations, fewer practitioners will remain available to serve Title X patients. The right to informed consent based on full information is central to the codes of ethics for all professional groups which provide pregnancy-related services. *See New Regulations* at 224. The National Family Planning and Reproductive Health Association (NFPRA), which represents eighty-five percent of Title X recipients, predicts that the majority would refuse to subject themselves to the new regulations. Comment, *The Title X Family Planning Gag Rule Can the Government Buy Up Constitutional Rights?* 41 Stan. L. Rev. 401, 408 (1989). Providers of family planning services to low income women cannot easily be replaced. As it is, of the 9.5 million women in this country with family incomes below 150 percent of the poverty level, 4.5 million are receiving no organized family

planning services. Torres and Forrest, *Family Planning Clinic Services in U. S. Counties, 1983,* 19 Fam. Plan. Persp. 54, 57 (1987).

Publicly funded family planning services, which will be sacrificed because of ideological objections to balanced counselling and referral for the four percent of Title X patients who are pregnant, play an indispensable role in preventing millions of unintended pregnancies. Researchers estimate the use of contraceptives from publicly funded sources is responsible for preventing up to 3.1 million unintended pregnancies annually. Forrest and Singh, *Public-Sector Savings Resulting from Expenditures for Contraceptive Services,* 22 Fam. Plan. Persp. 6, 11 (1990). Savings in public social service and welfare costs from contraceptive use by women relying on publicly funded providers represents up to $11.26 for each dollar spent to provide family planning services; the annual savings is an estimated 4.6 billion dollars. *Id.* at 11-12. Thus a cost beneficial program is scuttled to prevent four percent of the women it serves from discovering that they may obtain an abortion.

The regulations pose a Hobson's choice for any states which do not agree that pregnant women are best served by state-enforced ignorance of their options. If states forego Title X assistance, less funding will remain to subsidize Title X services. If states remain in the program, their own funds will be held hostage to requirements with which the states may vehemently disagree, many providers will refuse to participate, and those who remain will be required to conceal opticns when medical judgment may mandate disclosure. Either way, services to low income women and teenagers will suffer.

II. THE DECISION OF THE SECOND CIRCUIT CONTRAVENES RULINGS OF THIS COURT WHICH PROTECT THE PRIVACY, LIBERTY, AND FIRST AMENDMENT INTERESTS OF WOMEN IN MAKING INFORMED CHOICES REGARDING THEIR REPRODUCTIVE HEALTH, AND WHICH PROHIBIT THE USE

OF FEDERAL SPENDING TO INFLUENCE IMPROPERLY A STATE'S DISPOSITION OF ITS OWN RESOURCES.

This Court has held that the government may, in the exercise of its spending powers, flatly decline to pay for the medical procedure of abortion, *Harris v. McRae,* 448 U.S. 297, *reh. denied,* 448 U.S. 917 (1980); *Maher v. Roe,* 432 U.S. 464 (1977); or refuse to permit the procedure to be performed in government-owned facilities, *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989), notwithstanding a woman's constitutional right to freedom of reproductive choice. *Roe v. Wade,* 410 U.S. 113 (1973); *Griswold v. Connecticut,* 381 U.S. 479 (1965). This Court's decision in *Webster* did not address the issues presented herein, as the majority concluded the first amendment question presented by the prohibition of abortion counselling and referral by publicly funded family planning clinics was moot. 109 S. Ct. at 3053-54. It was noted that a constitutional issue could arise if the statute were interpreted to prohibit publicly employed health professionals from giving specific medical advice. *Id.* at 3060 (O'Connor J., concurring), 109 S. Ct. at 3069 n.1 (Blackmun J., concurring/dissenting).

A. THE AMENDED REGULATIONS IMPOSE AN IMPERMISSIBLE OBSTACLE TO A WOMAN'S PERSONAL REPRODUCTIVE CHOICE IN VIOLATION OF HER LIBERTY AND PRIVACY RIGHTS AS PROTECTED BY THE CONSTITUTION.

Whatever degree of constitutional protection a woman's choice to terminate her pregnancy may enjoy, it is clear that, at the very least, the government may not impose obstacles to thwart the abortion decision. *Harris v. McRae,* 448 U.S. at 314; *Maher v. Roe,* 432 U.S. at 473. The HHS regulations fail even this minimal test.

This Court's decisions have made it clear that central to the woman's privacy right is the opportunity to make an informed decision. *See Thornburgh v. American College of*

Obstetricians and Gynecologists, 476 U.S. 747, 759, 762 (1986); *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 429-30 (1983). As observed in another context by the United States Court of Appeals for the District of Columbia Circuit:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an *opportunity to evaluate knowledgeably the options available and the risks attendant upon each.* The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.

Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972) (emphasis added) (footnotes omitted), *cited* in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. at 799 (White, J., dissenting); *see also Cruzan v. Missouri Dept. of Health,* 58 U.S.L.W. 4916, (June 25, 1990).

The Second Circuit determined, on the basis of *Maher, Harris,* and *Webster,* that no one has the "right" to federally-funded abortion counselling. *State of New York v. Sullivan,* 889 F.2d at 410-12. The lower court reasoned that a pregnant woman, therefore, is left in the same position as if the government had funded no counselling at all, and none of her rights are infringed. *Id.* The conclusion, that a woman is constitutionally unharmed by this funding decision, defies reality, and constitutes slight of hand with what is actually being funded.

Despite the regulations' disingenuous disclaimer that pregnancy counselling and referral are now beyond the scope of Title X family planning services, the rules *do* provide

for federal funding of a counselling and referral conversation between health care professional and patient. The Title X clinic is required to "counsel" the patient by telling her that the project deems abortion to be an inappropriate option, and it must "refer" her to providers of pre-natal care even if she inquires about an abortion. 42 C.F.R. Section 59.8(b)(5) (1988). Rather than simply refusing to subsidize counselling and referral, the regulations endeavor to censor the contents of the funded counselling and referral to conceal the abortion option from the patient.

Therefore, the patient does not remain in the same position as she would have been had the government decided not to fund any Title X services. As found by the First Circuit:

> We are particularly struck by the effect these restrictions have on poor women who are forced to rely on Title X clinics. They are significantly worse off than they would have been if the government had not provided the clinics because they have received misinformation rather than no information about their options. In addition, because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 70 (1st Cir. 1990) (en banc).

The amended regulations pose a trap for the unsophisticated and unwary patient. The exchange between the woman and Title X professional has all the appearances of government-sponsored counselling and referral, from which the patient is likely to conclude she has received full information. But only an incomplete counselling and referral has occurred, and the patient has been affirmatively misled.

The government can therefore arguably remain neutral, in the same sense it has been deemed by this Court to remain

neutral in refusing to fund the entire abortion procedure, only by refusing entirely to fund any counselling and referral procedure. Neutrality can be accomplished only either by full disclosure of all options or by refusal to discuss *either* abortion or childbirth options with the patient, and by refusal to make *any* referrals to either pre-natal care or abortion service providers.[5] Otherwise, the regulations do not simply fail to remove obstacles to abortion; they create obstacles.

This case does not present a question which may be simply resolved on the basis of the government's power to tax and spend. The distorted information required to be dispensed compromises the patient's right to make a fully informed choice. As found by the Eighth Circuit in striking down a similar state ban on the use of state funds to counsel or encourage abortion:

> We think that the state's analogy of its ban on "encouraging or counselling" to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

Reproductive Health Services v. Webster, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989). This finding was not disturbed in this Court's *Webster* decision. *See supra* at 10.

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[5] Of course, a refusal to provide *any* counselling or referral would not be consistent with the authorizing statute. 42 U.S.C.A. Sections 300, et seq. (West 1982). Nor would a ban on providing any information about health risks on abortion necessarily comport with the woman's privacy and liberty interests in informed consent, or with the first amendment.

In *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. at 444-45, this Court struck down an ordinance which required the physician to inform the patient of a "parade of horribles" which implied that the abortion procedure was particularly dangerous. The compulsory provision of misinformation to the patient was deemed to have imposed an "undue obstacle" to her freedom of reproductive choice. Eventually, even two of the three dissenters in *City of Akron* apparently agreed with this result:

> I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice."

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 800 (White, J., joined by Rehnquist, J., dissenting).

One is unable to choose between two options if one is kept unaware by the government that one has a choice at all. Deliberately incomplete and misleading information about one's options is indistinguishable from the "disinformation" at issue in *City of Akron.* Consequently, the result in this case should be the same. Because the counselling and referral required by the amended regulations create the impression of full disclosure while concealing the option to terminate pregnancy, the government has imposed an impermissible obstacle to a woman's right to choose. This Court should find the amended regulations violate the constitutional privacy and liberty interests in freedom of reproductive choice.

B. THE AMENDED REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF TITLE X PATIENTS AND HEALTH CARE PROVIDERS.

Maher, Harris, and *Webster* held that the government's control over its own purse strings justified a refusal to fund, or permit on its premises, abortion *procedures,* while at the

same time funding and permitting childbirth *procedures.* These cases did *not* reach the question whether the federal government may use its considerable taxing and spending powers to suppress *speech* regarding the advisability of abortion. Because the contested rules directly suppress speech, the reliance placed by HHS and the Second Circuit on *Maher, Harris,* and *Webster* is misplaced.

Certainly, the government may constitutionally warn its citizens of the risks of smoking or the evils of drug abuse. A traditional public health campaign is designed to impart information, not to censor it — to persuade, not to manipulate. The HHS regulations, however, embody a program of official subterfuge, the thrust of which is not merely to take sides in the abortion debate, but to squelch any debate by hiding the abortion option. As opposed to persuasion, official manipulation and censorship offend the core values of the first amendment.

This case does not involve internal management of a proprietary governmental operation, *United States v. Kokinda,* 58 U.S.L.W. 5013, 5014-15 (June 27, 1990) (plurality opinion), or the rights of government employees, *Connick v. Myers,* 461 U.S. 138 (1983), where first amendment rights must sometimes yield to the government's interests as an employer. Here the government is granting a subsidy to private or independent public health care professionals, many of whom were providing family planning and abortion referral services long before Title X was enacted. Dryfoos, *Family Planning Clinics-A Story of Growth and Conflict,* 20 Fam. Plan. Persp. 282, 283 (1988). The decisions of this Court are clear that the government cannot condition receipt of a government subsidy upon manipulation of first amendment rights of the grantees.

In *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980), this Court struck down a state regulation which forbade a public utility from inserting into its billings any discussion of "political matters," including advocacy of nuclear power. Naturally, public utilities are heavily regulated entities which enjoy a state subsidy in the form of a state-

created monopoly. *Id.* at 549 (Blackmun, J., dissenting). This Court noted:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. . . . If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating" To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Id. at 537-38, *quoting, Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) (additional citations omitted).

Other decisions of this Court have clearly suggested that the government's privilege to subsidize or refuse to subsidize speech ends where the funding choice is no longer content-neutral. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983), involved federal subsidies to charitable organizations in the form of tax deductions for contributions to these entities. This Court held that Congress could refuse to subsidize all lobbying activities by 501(c)(3) charitable organizations without violating those organizations' first amendment rights. This Court was careful to point out, however, that the restriction on deductability for lobbying was content neutral. "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas.'" *Id.* at 548, *citing, Cammarano v. United States,* 358 U.S. 498, 513 (1959), *quoting, Speiser v. Randall,* 357 U.S. 513, 519, *reh. denied,* 358 U.S. 860 (1958).

Similarly, in *F.C.C. v. League of Women Voters,* 468 U.S. 364 (1984), this Court struck down a prohibition of on-air "editorializing" by publicly-subsidized educational television stations. While arguing the content-neutral ban should be upheld as a permissible election not to subsidize on-air editoralizing, the dissent noted:

> This is not to say that the Government may attach any condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily '"'aimed at the suppression of dangerous ideas.'"'

Id. at 407, (Rehnquist, J., dissenting), *quoting Cammarano v. United States,* 358 U.S. at 513, in turn *quoting Speiser v. Randall,* 357 U.S. at 519, in turn *quoting American Communications Assoc. v. Douds,* 339 U.S. 382, 402 (1950). *See also Arkansas Writers' Project v. Ragland,* 481 U.S. 221 (1987).

Because the challenged regulations directly affect speech in either a content-or viewpoint-discriminatory manner, and are manifestly aimed at suppressing the "dangerous idea" of abortion, they cannot be upheld on the basis of *Maher, Harris, and Webster.*

Rather, this Court has long held that the state may not condition receipt of a valuable benefit on the forfeiture of a constitutional right. In *Perry v. Sindermann,* 408 U.S. 593, 597 (1972), the Court declared:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech .... This would allow the government to "produce a result which [it] could not command directly."

Citing Speiser v. Randall, 357 U.S. at 526 (tax exemption subsidy cannot be conditioned on forced speech); *see also*

Rutan v. Republican Party of Illinois, 58 U.S.L.W. 4872 (June 21, 1990); *Elrod v. Burns*, 427 U.S. 347 (1976) (conditions of public employment cannot be conditioned on forfeiture of rights to political association); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits cannot be conditioned on relinquishment of religious convictions).

Clearly, the federal government could not condition tax benefits to Title X clinics on whether abortions were advised. Nor could all welfare benefits be cut off to women who advocate abortion. Nor may HHS condition the grant of Title X subsidies to family planning providers, and the grant of Title X subsidized counselling and referral services to low income women, on both parties' relinquishment of their mutual first amendment rights to exchange full and complete information about reproductive choices. *See Bigelow v. Virginia*, 421 U.S. 809 (1975).

C. THE AMENDED REGULATIONS IMPOSE UNCONSTITUTIONAL CONDITIONS UPON THE EXPENDITURE OF STATE FUNDS COMMITTED TO TITLE X PROJECTS.

In addition to jeopardizing seriously the interests of women in full information regarding their reproductive health, and inhibiting the ability of health care professionals to provide this information, the amended regulations also affect the ability of states to use state revenues as they see fit to fund Title X projects. The amended regulations redefine "Title X project" to include not only the federal Title X grant, but also state, local, or private funds.

The regulations run afoul of the Constitution's Spending Clause. U.S. Const. art. I, Section 8. In *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), this Court recently summarized the four separate constitutional limitations upon federal use of its spending power to influence a state's exercise of its own constitutional powers: 1) the federal spending exercise must be in pursuit of the "general welfare," and Congress is entitled to substantial deference in determining what the "general welfare" may be; 2) any conditions on state

acceptance of the grant must be unambiguous, in order that the state may know in advance the consequences of its participation; 3) the conditions must be related to the purpose of the federal expenditure; and 4) the federal spending power may not be used to induce the states to engage in activities which are themselves unconstitutional. The amended regulations fail all four tests.

First, keeping women in the dark regarding their reproductive options is not in anyone's best interest. Rather, this approach is directly antithetical to the philosophy, firmly embedded in the first amendment, that the public interest is best served by the free competition of ideas in the marketplace of public opinion. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Further, as eloquently detailed in the *amicus* brief of the American Public Health Association, there are numerous circumstances under which the absolute prohibition on abortion referral will result in serious jeopardy to the health of the mother and will violate sound medical practice. Moreover, it is impossible to give deference to Congress' determination of the public interest when the amended regulations appear more a product of administrative fiat than an expression of Congressional intent. *See* Petition of State of New York *et al.*, pp. 16-24; Petition of Dr. Irving Rust, pp. 20-27.

Second, some of the regulations impose conditions on state spending which are far from clear. For example, 42 C.F.R. Section 59.9 (1988) requires that at least some personnel or facilities used for "prohibited activities" be separate from those used for Title X activities, even if the prohibited activities are not funded by Title X. The separation requirements are merely factors to be considered by the Secretary of HHS in deciding whether a grantee is in violation of the regulations. The rule contains virtually no standards from which HHS bureaucrats may determine compliance, except that "mere bookkeeping separation" is insufficient. *Id.* Participating states will remain unsure under what circumstances they may separately fund "prohibited" abortion counselling and referral activities, without undergoing the crippling expense of employing separate

personnel or obtaining separate physical facilities.

Third, Title X is, first and foremost, a public health program. The amended regulations operate in a manner contrary to the Congressionally mandated purpose for the spending, in the same manner that they operate contrary to the "public welfare." Fourth, the amended regulations would induce the states to use state monies to support services performed in a manner that violates the constitutional rights of women and health care professionals.

The new regulations reflect far more than a value judgment affecting the expenditure of federal dollars. The regulatory scheme also conditions states' participation in Title X upon state acceptance of identical limitations on use of state funds, regardless of state policy. And the rules construct obstacles to the states' separate funding of balanced counselling and referral services which cannot be justified by the need to account separately for Title X funds. Therefore, the amended regulations are unconstitutional under *South Dakota v. Dole*.

CONCLUSION

For all the foregoing reasons, the Court should reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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CALIFORNIA

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Los Angeles Regional Family Planning Council	151,609	129,949	$4,841,331	$9,127,980	$7,505,700	N/A	$21,475,011
California Family Planning Council	262,959	216,391	7,483,349	18,739,469	N/A	N/A	26,222,818
TOTALS	414,568	346,340	$12,324,680	$27,867,449	$7,505,700	$ N/A	$47,697,829
			25.84%	58.42%	15.74%		100%

NOTES:

1. Total number of women served and dollars reflected represents Basic Contraceptive Services for fiscal year 1988-1989.
2. N/A = Information is not available.
3. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal peverty guidelines.
4. The total of Columns C-F reflects funds that are subject to Title X regulations.
5. California Family Planning Council (CFPC) requires reporting by agencies of non-Title X funds. This total amount, including state funds, is reflected in Column (D). A detailed breakdown of non-Title X funds is not available for CFPC.

MAINE

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award	(D) Non-Title X	(E) State Funds	(F) MCH Block	(G) Total Columns (C) - (F)
Family Planning Association of Maine	32,460	24,353	$818,000	$1,875,000	$1,440,000	$ - 0 -	$4,133,000
			19.79%	45.37%	34.84%		100%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect figures from fiscal year 1990.

2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

MASSACHUSETTS

	(A)	(B)	(C)
	Total Women	Women at or below 150% of poverty	Title X Award
Family Planning Clinics	88,000	76,560	$3,055,425
			37.47%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the columns (C-G) reflect figures from calendar year 1989.

2. Column B reflects the number of women in Column A whose incomes are at or below 200% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

(D)	(E)	(F)	(G)
Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
$2,640,000	$2,460,000	$ N/A	$8,155,425
32.37%	30.16		100%

NEBRASKA

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Nebraska Department of Health	24,521	19,369	$935,000	$1,069,853	$ -0-	$259,964	$2,264,817
			41.28%	47.24%		11.48%	100%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect actual figures from fiscal year 1989.

2. Total in Column A reflects unduplicated female users.

3. The total in Column B reflects the total unduplicated female users in Column A whose incomes are at or below 150% of the federal poverty guidelines.

4. Non-Title X includes first, second and third party reimbursement such as patient fees, insurance, and medicaid as well as funds from other source.

5. Maternal and Child Health Block Grant.

OHIO

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award
Ohio Dept. Of Health	87,787	73,137	$2,932,323
Federation For Community Planning (Cleveland)	28,685	27,369	1,017,761
Planned Parenthood Summit, Portage and Medina Counties	15,051	13,490	525,230
Planned Parenthood Central Ohio	10,543	9,054	435,770
TOTALS	142,066	123,050	$4,911,084
			38.17%

NOTES:

1. Total Women provided family planning services through Title X activities.
2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.
3. Non-Title X includes first, second and third party reimbursement such as patient fees, insurance and medicaid as well as agency operating funds.

(D) Non-Title X	(E) State Funds	(F) MCH Block	(G) Total Columns (C) - (F)
$3,219,015	$431,000	$275,000	$6,857,338
1,232,863	126,500	- 0 -	2,377,124
1,518,763	55,000	- 0 -	2,098,993
1,064,230	33,000	- 0 -	1,533,000
$7,034,871	$645,500	$275,000	$12,866,455
54.68%	5.02%	2.14%	100%

5. The total of Columns C-F reflects funds athat are subject to Title X regulations.

TEXAS

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award
Texas Dept. of Health	328,497	244,730	$7,960,524
			28.99%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the columns (C-G) reflect figures from calendar year 1989.
2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.
3. The total of Columns C-F reflects funds that are subject to Title X regulations.
4. Column D includes additional state money in th form of matching funds which cannot be distilled from the other funds.

(D) Non-Title X	(E) State Funds	(F) MCH Block	(G) Total Columns (C) - (F)
$13,502,198	$3,540,301	$2,460,209	$27,463,232
49.16%	12.89%	8.96%	100%

VERMONT

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award
Planned Parenthood of Northern New England	11,650	6,443	$425,962
Vermont Department of Health	_____	_____	6,358
TOTALS	11,650	6,443	$432,320
			24.98%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect figures from fiscal year 1990.

2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

4. Vermont agency statistics do not contain a breakdown of patients at or below 150% of poverty by gender. Since 98% of all Title X patients were women, we assume that 98% of those in poverty were women. *See* Column B.

5. Planned Parenthood of Northern New England receives the funds in Column C for services provided under contracts with the Vermont Department of Health.

(D) Non-Title X	(E) State Funds	(F) MCH Block	(G) Total Columns (C) - (F)
$1,040,940	$257,076	$ - 0 -	$1,723,978
_____	_____	$ - 0 -	6,358
$1,040,940	$257,076	$- 0 -	$1,730,336
60.16%	14.86%		100%

6. Column D is the sum of patient fees: $923,044; Medicaid; $77,109; tuition/fees: $18,475; and miscellaneous agency funds: $22,312.

VIRGINIA

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award	(D) Non-Title X	(E) State Funds	(F) MCH Block	(G) Total Columns (C) - (F)
Department of Health	82,704	68,644	$2,590,818	$556,160	$8,791,995	$1,749,907	$13,688,880
			18.93%	4.06%	64.23%	12.78%	100%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect figures from fiscal year 1991.

2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

4. Column E includes local department of health funds because under Virginia Code Ann. §32.1-31 (1950) as amended, the local departments of health are state agencies.